IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-953

MICHAEL O'SHEA, As Magistrate of the Circuit Court For Alexander County, Illinois, et al.,

Petitioners,

vs.

EZELL LITTLETON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY OF PETITIONERS

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago, Illinois 60601, 312-793-3500,
Attorney for Petitioners.

ROBERT J. O'ROURKE,
Deputy Attorney General,
FRED F. HERZOG,
First Assistant Attorney General,
JOHN W. FREELS,
Special Assistant Attorney General,
JERRALD B. ABRAMS,
Assistant Attorney General,
Of Counsel.

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REPLY OF PETITIONERS

At the outset, we respectfully submit that we feel it our duty to point out that plaintiffs' Brief misquotes the record. On page 5 and again on page 13, it is stated that the judges discriminate by following "an unofficial bond schedule applicable to black persons. . . ." An identical allegation was made on page 5 of plaintiffs' Brief in Opposition to our Petition for Certiorari.

We pointed out on pages 6 and 11 of our Brief that there was no such charge made in either the original or the amended complaint. On page 6 we stated the complaint charged with regard to bonds that the judges ". . . follow an unofficial bond schedule in criminal cases; no charge is made, as has been done with respect to sentencing practices, that there exists discrimination in the treatment of white and black persons." A similar statement was made on page 11. In addition, footnotes numbered 3 and 4 on pages 6 and 11 again stated the misquoted words did not appear in the complaint.

We realize that when, as is apparent here, counsel have a strong personal commitment to their cause, it is difficult to have an impartial objectivity, and that, by inadvertence, a mistake may result from confusing what is in the mind with what is in the record.

The supposed charge of discrimination in fixing bail is present only in the mind of counsel, and its constant reiteration seems to indicate that it is the chief foundation of their brief.

As noted above, plaintiffs' brief opposinrg our Petition for Certiorari made the identical misquotation from the complaint as plaintiffs' present brief does on pages 5 and 13.

As shown on page 12 of Appendix II, the actual allegations in the complaint were:

> They set bond in criminal cases without regard to the Constitution and statutes of the State of Illinois requiring that bond be merely an assurance that defendant will appear in court when required, not that it be a punishment, in that they follow an unofficial bond schedule without regard to the facts of a case or circumstances of an individual defendant, all in

> violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

There is no allegation in that language that any discrimination had been practiced against blacks, but only that the judges used an unofficial bond schedule in *all* criminal cases. It is entirely different from the following allegation "b" that the judges "set sentences higher for plaintiffs . . . than for white persons and imposed harsher conditions." Allegation "b" does make an assertion (wholly unsupported by reference to a single incident) that discrimination is practiced in sentencing. It is fundamental that separate allegations be read as a whole and where one clause includes a specific charge of discrimination which does not appear in the other, no amount of wishful thinking will put it there.

The Summary of Argument (page 8) seems to plead confession and avoidance by stating "mere vagueness or lack of detail is not a ground for a motion to dismiss." Though the Summary makes no reference whatever to any alleged discriminatory practices of the judges, the Argument itself repeats several times the unalleged and unsupported claim of discrimination in setting bail. As an example, the Brief on page 13 contains the entirely fictitious statement:

> The amended complaint charges that Spomer and O'Shea set higher bonds in criminal cases for black persons than they do for white persons in that they follow an unofficial bond schedule which is utilized when the accused is black.

The unrestrained enthusiasm and bias of plaintiffs is demonstrated by the amazing claim at the bottom of page 13 that "Section 1982 is contravened in that the imposition

of higher bonds . . . prevents black persons from holding real and personal property to the same extent as white persons." Plaintiffs seem perfectly willing to assume that an allegation of using unofficial bond schedules in all criminal cases must necessarily mean that blacks, and only blacks, are required to furnish "higher bonds."

The urge to dwell continuously on a charge not made in the complaint is shown by the prayer on page 18 that ". . . [the] two petitioners be directed to set bond in criminal cases . . . in a nondiscriminatory manner without regard to race or creed." This would truly be relief without allegation in the complaint or substantiation in the record.

No attempt has been made to answer our argument on page 9 of our Brief that the complaint "did not contain a single specific charge against either of the judges, but only general and conclusory allegations." On page 11 our Brief quoted the Opinion of the lower court which states:

> . . . in Civil Rights Act cases, highly specific factual averments are required to defeat a motion to dismiss, otherwise "every complaint against a state official by the simple expedient of averring conclusions would be cognizable in the federal courts. . . ."

Plaintiffs' Brief makes no attempt to distinguish or explain away the language of the Opinion or to answer our statement at the bottom of page 11 that " . . . there was not a single factual averment as to trials or sentences in the past but only . . . a request that the court enjoin the conjectural possibility of discrimination against someone in the future."

No attempt whatever is made to show the "highly specific factual averments" necessary for a finding against the judges. Instead, plaintiffs' Brief uses several pages

to itemize the specific complaints against the state's attorney and then, ignoring entirely the absence of any similar charges against the judges, blatantly states on page 16:

> The capricious conduct of *these petitioners* was precisely that which was sought to be cured by the Thirteenth and Fourteenth Amendments and the Civil Rights Act. (Emphasis Added)

Plaintiffs' Brief seems chiefly based on implication, innuendo, wishful thinking, and "guilt by association." It is unresponsive to our Brief and makes no attempt to analyze or meet the issues presented in that Brief.

The product of plaintiffs' confusion with regard to specific allegations is the ingenuously muddled characterization of their own class. Manifest in their own analysis of the class at bar, plaintiffs have attempted to reconcile at least three incongruous groups. On one hand, they characterize their class as those persons, black and white, who are seeking to boycott certain businesses in Cairo in order to combat discrimination; on the other hand, they characterize their class as one entirely of blacks who have been discriminated against by the selective enforcement of the criminal justice system. In addition, they all claim to represent all persons (presumably black, white, or any other group) who are poor and are unable to afford bail, counsel, or jury trials in city ordinance cases. (see AII, 3, 16, 30; Pl. Br. 5, 13)

As a boycott class, both blacks and whites could possibly join together to challenge discriminatory practices against that group. Yet, (assuming *arguendo* a suit was permissible at all) even as this all encompassing body, plaintiffs have not shown or alleged that any person in that group has ever been before either of these defendant judges or has ever been discriminated against by them.

As an all black class, plaintiffs have erroneously included two white persons—Harris and Brown. Under the guise of a characterization that these are persons sympathetic to the black cause, plaintiffs attempted to bestow upon these alleged members instant standing. It is well settled, however, that in determining whether an action may be maintained as a class action, it is necessary that each individual has standing to bring suit in his own right. Fed. Rules Civ. Prac., Rule 23, 28 U.S.C.A.; *Thomas* v. *Clarke*, 54 F.R.D. 245 (D.C. Minn. 1971); and *Mintz* v. *Mathers Fund, Inc.*, 463 F. 2d 495 (CA Ill., 1972); see also: Dft's Br. pp. 15-17. Plaintiffs Harris and Brown, simply are not black persons. No amount of careful categorization, representation, or wishful thinking invests them with standing in that class.

Pervading the entire posture of plaintiffs' claim, is the mistaken reliance upon a phantom premise — i.e. that these judges engage in a "pattern and practice" of discriminatory conduct. The only response to our delineation of the facts which showed no evidence of this "pattern and practice" is contained on pages 12 and 13 of plaintiffs' Brief:

> A careful review of the amended complaint, however, refutes their contention, as noted by the court below.

Following this short statement, plaintiffs merely recite the allegations contained in the complaint and conclude on page 13: "[r]espondents thus have prorperly stated a claim for equitable relief." Their analysis, in effect, may be characterized as saying: "it is so — because we say so." Defendants respectfully submit that no facts have been alleged against these judges which could support a claim for relief.

Indeed, these defendant judges have specifically demonstrated on pages 15-17 of their Brief that none of the plaintiffs have standing to bring this action. No plaintiff has alleged that he or she has ever been discriminated against by either of these judges with respect to *any* allegation. Moreover, not one plaintiff even alleged that he or she had ever been before either of these defendants in a judicial proceeding.

Obviously, the plaintiffs and defendants at bar do not stand in adverse capacities sufficient to warrant federal jurisdiction. Plaintiffs have failed to show that a real controversy exists. Instead, plaintiffs have asked the federal courts to intervene in an abstract situation — one completely devoid of adverse interests—and render an advisory opinion. See: *Muskrat* v. *United States*, 219 U.S. 346 (1910); *Aetna* v. *Haworth*, 300 U.S. 227 (1937); and *Younger* v. *Harris*, 401 U.S. 37 (1971); see also: Dft's Br., 15-17. Notably, plaintiffs did not respond to the argument as set out in our Brief.

In an effort to circumvent the obvious fact that they are asking the federal court to supervise a state judge's *discretionary* judgments, the plaintiffs argue that these judges have acted outside their authority, (Pl. Br., 24) and therefore do not come within the ambit of judicial immunity. However, plaintiffs fail to recognize that the courts have long afforded judges immunity even in cases of abuse of their authority. *Bradley* v. *Fisher*, 13 Wall. 335, 80 U.S. 649 (1871); and *Pierson* v. *Ray*, 386 U.S. 547 (1967). A judge may lose his immunity when he acts without *jurisdiction*. *Holmes* v. *Silver Cross Hospital of Joliet*, 340 F. Supp. 125 (D.C. Ill. 1972); compare: *Wade* v. *Bethesda Hospital*, 337 F. Supp. 671 (D.C. Ohio 1971);

see also: *Pierson* v. *Ray*, supra, at 554. Plaintiffs have not alleged, indicated, or implied any set of facts which revealed either judge lacked jurisdiction. Indeed, in light of the fact that no plaintiff has ever been before these defendants, their statement that these judges have acted "outside" their authority is an absurd attempt to substantiate facts not in existence.

In conclusion, the court below countenanced federal actions against state judges upon allegations neither pleaded in fact nor even in existence. Indeed, the plaintiffs here have presented a class (or classes) so encompassing as to make impossible an accurate definition. Moreover, the lack of any case or controversy existing between these litigants renders plaintiffs' relief advisory and, hence, inopportune.

It is, therefore, respectfully asked that the decision of the District Court be affirmed, and the decision of the United States Court of Appeals for the Seventh Circuit be reversed as to these judges; and furthermore, that this Court hold the doctrine of judicial immunity protects all judges in the performance of judicial acts.

Repectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street—Suite 900,
Chicago, Illinois 60601 (793-3500),
Attorney for Petitioners.

ROBERT J. O'ROURKE,
Deputy Attorney General,
FRED F. HERZOG,
First Assistant Attorney General,
JOHN W. FREELS,
Special Assistant Attorney General,
JERRALD B. ABRAMS,
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